83-762

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL A. LaFALCE,

Petitioner,

vs.

MICHAEL HOUSTON and
CITY OF SPRINGFIELD, ILLINOIS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Does the denial of a bus stop bench maintenance and advertising contract to one person and the awarding of the contract to another by the mayor and a city on the basis of the political associations of the applicants violate the First Amendment and the Due

Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution?

II. May a city and its mayor award and deny contracts on the basis of the political associations of the applicants?

III. Does a person who alleges that his bus stop maintenance and advertising contract was the most favorable to the city but was rejected and awarded to another person by the mayor and city on the basis of the political associations of the applicants state a cause of action under 42 U.S.C. 1983 against the mayor and the city?

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OFFICIAL REPORTS IN EARLIER PROCEEDINGS

The Opinion of the United States District Court for the Central District of Illinois granting Respondents' Motion to Dismiss appears in the Appendix to this Petition (App. pp. A-1 to A-14) and is not yet reported.

The Opinion of the United States Court of Appeals for the Seventh Circuit also appears in the Appendix to this Petition (App. pp. B-1 to B-9). That decision is reported at 712 F.2d 291 (7th Cir. 1983).

JURISDICTION

The Seventh Circuit Court of Appeals issued its opinion on July 14, 1983. On August 9, 1983, the Court denied petitioner's Petition for Rehearing with Suggestion for Re-hearing En Banc. (App. pp. C-1 to C-2).

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254 (1).

This case was brought in the District Court under 42 U.S.C. 1983 and jurisdiction arose in that

Court under 28 U.S.C. 1343.

STATUTES INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section I of the Fourteenth Amendment to the United States provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of

the laws.

Section 1983 of Chapter 42 of the United States Code provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

Since this case arises on the granting of a Motion to Dismiss, and the affirmation thereof, all facts pled in the Complaint are taken as true.

Petitioner, who ran a sign business, bid on

a contract to become the exclusive seller and provider of bus stop advertising benches in the City of Springfield.

His bid was most favorable to the City, but was rejected by the mayor and the city because the Petitioner had not been a political supporter of the mayor while the operator who was awarded the contract was.

Petitioner filed a claim under 42 U.S.C. 1983 asserting this conduct violated his First Amendment rights and his Fourteenth Amendment rights of due process and equal protection.

The trial court granted respondents' Motion to Dismiss ruling that the mayor and the City could deny such a contract because petitioner had not supported the mayor politically while the successful bidder had. The Seventh Circuit Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The decision of the Seventh Circuit Court of Appeals is of major significance because it announces a rule of law for government contractors different than that established by this Court for government employees. The decision affects government officials, business people and the manner in which public money will be spent. The decision creates different classes of citizens depending upon the nature of their contract with government.

The decision of the Seventh Circuit Court of Appeals departs from the traditional analysis and approach of this Court when addressing First Amendment issues. That traditional approach begins with the premise that all persons have the rights protected by the United States Constitution. Those rights may be limited but only by an overriding state interest. If such a limitation is imposed, it must be done in a manner that complies

with the due process clause of the Fourteenth Amendment to the United States Constitution. Instead the Seventh Circuit approached the case as if it would be granting or extending or creating rights rather than reviewing a limitation on existing rights.

I. The Decision of the Seventh Circuit Is A Significant Departure from the Principles Enunciated By This Court In Prior Decisions.

In Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673 (1976), this Court held that public employees who were discharged or threatened with discharge solely due to their partisan political affiliation or nonaffiliation stated a claim for deprivation of constitutional rights secured by the First and Fourteenth Amendments to the United States Constitution. In its opinion this Court recognized that patronage employment had existed for decades -- just as the Seventh Circuit recognized that

patronage contracts had existed for years. The Seventh Circuit approached the issue as a historical political science issue rather than an issue of law. In Elrod this Court rejected just such an approach saying:

> Rather, inquiry must commence with identification of the constitutional limitations implicated by a challenged governmental practice. 96 S. Ct. at 2680

and further said:

> The cost of the practice of patronage is the restraint it places on freedoms of belief and association. 96 S. Ct. at 2680-2681.

This Court recognized that in order to maintain their jobs, the employees had to work for and financially support the in-party. Such financial and campaign assistance "is tantamount to coerced belief." 96 S. Ct. at 2681. Not only is the individual's belief and association restricted, "The free functioning of the electoral process suffers." 96 S. Ct. at 2681.

This Court has repeatedly affirmed the principles that political belief and association form the core of activities protected by the First Amendment to the United States Constitution. Whitney v. California, 274 U.S. 357, 47 S. Ct. 641 (1927); Stromberg V. California, 283 U.S. 359, 51 S. Ct. 532 (1931); DeJonge v. State of Oregon, 299 U.S. 353, 57 S. Ct. 255, 260 (1937); West Virginia Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178 (1943); Thomas v. Collins, 323 U.S. 516, 65 S. Ct. 315 (1945); Sweezy v. New Hampshire, 354 U.S. 234, 77 S. Ct. 1203, (1957); N.A.A.C.P. v. Alabama, 357 U.S. 449, 78 S. Ct. 1163, (1957); Bates v. City of Little Rock, 361 U.S. 516, 80 S. Ct. 412 (1960); Shelton v. Tucker, 364 U.S. 479, 81 S. Ct. 247 (1960); N.A.A.C.P. v. Button, 371 U.S. 415, 83 S. Ct. 328 (1963); Gibson v. Florida Legislative Investigation Commission, 372 U.S. 539, 83 S. Ct. 889 (1963); N.A.A.C.P. v. Alabama, 377 U.S. 288, 84 S. Ct.

1302 (1964); Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782 (1977); First National Bank v. Bellotti, 435 U.S. 765, 98 S. Ct. 1407 (1978); Branti v. Finkel, 445 U.S. 507, 100 S. Ct. 1287 (1980).

These and other decisions of the United States Supreme Court have consistently made clear that First Amendment rights are not begrudgingly recognized. Rather such rights are an essential and worthwhile ingredient of our governmental system.

These rights are no less compromised because the nature of the contract with government is one of painting and maintaining benches of the respondent City. The cost of patronage in awarding such a contract is the restraint it places on freedoms of belief and association. It forces support, particularly financial support, for the in-party if one is to have an opportunity to obtain a government contract; such forced assistance

is tantamount to coerced belief. It can severely interfere with the free functioning of the electoral process. The Seventh Circuit recognized that petitioner's argument had "an appealing symmetry" but went on to reject it.

Petitioner contends that its argument was based upon this Court's traditional approach to First Amendment issues: Petitioner has the right to freedom of belief and association; his right can be limited for an overriding state interest; if it is so limited, the limitation must comply with the due process clause of the Fourteenth Amendment.

Neither the respondents nor the District Court nor the Seventh Circuit put forth any overriding state interest that would justify the limitation on petitioner's right to freedom of belief and association. The Seventh Circuit based its decision on: 1) The fact this country has had patronage award of contracts for a long time;

2) Contractors may not be as dependent upon governmental contracts as are public employees; 3) Contractors may support both parties; and 4) Ruling in favor of petitioner will lead to much litigation by disappointed bidders.

Not one of these reasons constitutes an overriding state interest. The duration of the practice itself was rejected in Elrod, supra. Whether or not contractors are dependent upon governmental contracts is irrelevant. What is relevant is that if a contractor wants a piece of the action, that is, a government contract, he can be forced to support the in-party despite his beliefs. Petitioner suspects that all too many contractors are dependent upon government contracts. What is involved, then, is not the job of one government employee, but rather all the jobs of the employees of the contractor. Is the Seventh Circuit saying that in order for a contractor to maintain his freedom of speech and belief, he

simply must forgo consideration of government? Is the Seventh Circuit trying to say that it will now place a dollar value on the amount of impairment it will allow in violation of the First Amendment? We ask the Court to note that the amount each employee in Abood v. Detroit Board of Education, 431 U.S. 209, 97 S. Ct. 1782 (1977), was compelled to donate against his will was rather small, but this did not alter the fact of impairment.

The fact that the Seventh Circuit believes many contractors support both parties only demonstrates hypocrisy and the interference with the free functioning of the electoral process under the patronage system.

As to the "opening of Pandora's box" argument, this Court has not hesitated to do so when First Amendment rights are at issue. Need this be a valid concern in this case? Petitioner submits that proving such a case will be difficult. That, in itself, will prohibit extensive litigation.

Extensive regulation of bidding at the federal, state and local levels not only recognizes the undesirability of patronage contracting (as civil service laws recognized the undesirability of patronage employment), but will inhibit litigation in this area. In Illinois the Governor, the Attorney General and the Mayor of the City of Chicago entered into a Consent Decree in the Shakman case after the Seventh Circuit had ruled. Shakman v. Democratic Organization of Cook County, 435 F.2d 267 (7th Cir. 1970). That Consent Decree forbade:

> Compulsory or coerced political financial contributions by any governmental employee, contractor or supplier to any individual or organization and all compulsory or coerced political activity by any governmental employee.... 481 F.Supp. 1315, 1358 (emphasis added)

If the State officials in Illinois including its Attorney General and the politically astute Mayor of Chicago saw no significant dif-

ferences between the First Amendment rights of public employees and public contractors it is reasonable to assume that most public officials likewise make no genuine distinction and have in light of Elrod and Branti assumed that they could lawfully pass out jobs or contracts on the basis of politics. Given Elrod, Branti, and Shakman, it is reasonable to assume most public officials have done what Mayor Daley and Illinois State Officials did, that is, accept the concept that awarding contracts on the basis of politics is unconstitutional. The very reasoning of those cases (the appealing symmetry) has led public officials to conclude there is no difference between patronage employment and patronage contracting. The Seventh Circuit's opinion allows for the re-establishment of patronage contracting.

The Seventh Circuit viewed ruling in favor of petitioner as somehow extending to other persons rights already granted to public employees.

When cases such as Pickering v. Board of Ed. of Tp. H. S. Dist. 205, Ill., 391 U.S. 563, 88 S. Ct. 1731 (1968) were brought it was an attempt to bring public employees into the mainstream of constitutional law and to reverse decisions such as McAuliffe v. Mayor, Etc., of the City of New Bedford, 155 Mass. 216, 29 N.E.2d 517 (1892), which held a public employee surrendered his constitutional rights when he secured public employment. It is ironic, if now, public employees are the mainstream and other persons must fight to become part of that mainstream. This only demonstrates the difficulty resulting from the abandonment of this Court's traditional analysis of First Amendment issues.

II. The Opinion of the Seventh Circuit Will Have Profound Effects.

The announcement of a rule holding that government contracts may be awarded on the basis of politics will tend to encourage and cause ex-

pansion of the practice at a time the practice is ebbing.

As a result, the making of contributions will tend to become one of the standard costs of doing business and will tend to increase the cost of government services. As part of this process there will be a tendency to limit or freeze out those businesses which either do not wish to or cannot afford to compete for political favors and will tend to concentrate political power.

As part of this process, public officials who wish to award contracts on the basis of merit will lose ability to use Elrod and Branti, supra, as a justification for not awarding political contracts.

A subtle but real effect of such a judicially endorsed rule will be to reinforce the perception that government officials do things solely for political reasons and not for legitimate governmental reasons.

The opinion points the way for inventive public officials to evade the clear strictures of Elrod and Branti. By contracting out government services and getting political contributions for doing so, such officials can set up patronage operations which defeat the whole thrust of Elrod and Branti.

Possibly the most difficult problem which the opinion creates is how a public official can rationally explain the awarding of contracts to bidders providing political support when he cannot do the same as to his own employees. Such a distinction is unsupportable and if allowed to stand will tend to undermine the credibility of this Court.

CONCLUSION

Petitioner urges this Court to grant the Petition for Writ of Certiorari. If the Seventh Circuit opinion is allowed to stand, there will be two classes of persons with government contracts:

Public employees whose First Amendment rights are fully protected and secured and independent contractors who can be deprived of First Amendment rights. Petitioner urges this Court to assume jurisdiction, to apply the traditional analysis due First Amendment issues, and to reverse the Seventh Circuit Court of Appeals.

Respectfully submitted,

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IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF ILLINOIS-SPRINGFIELD DIVISION

PAUL A. LA FALCE, Plaintiff,	)	
v.	)	No. 82-3203
MICHAEL HOUSTON, Defendant.	)	

ORDER

In 1980, Plaintiff Paul A. LaFalce owned and operated a business known as Signs of Progress. The City of Springfield, in 1980, sought bids for the installation and maintenance of bus courtesy benches along the streets of the City. Plaintiff asserts that his bid was most favorable to the City, yet was rejected in favor of another company whose operators had been political supporters of Springfield Mayor Michael Houston. Count I of the complaint names Mayor Houston as the Defendant and seeks, pursuant to 42 U.S.C. § 1983, damages for an alleged violation of Plaintiff's First Amendment rights and for a

deprivation of due process and equal protection under the Fourteenth Amendment.

Attorneys for Defendant Houston have filed a motion to dismiss based primarily on absolute legislative immunity and Plaintiff's failure to state a claim for a First Amendment violation. Plaintiff seeks leave to amend his complaint to add the City of Springfield as a Defendant and to file instanter a memorandum in opposition to the motion to dismiss. Plaintiff's motions to amend and to file instanter are hereby allowed.

On July 8, 1980, the Springfield City Council passed an ordinance authorizing the execution of a contract between the City of Springfield and Ace Sign Company for the placement of bus courtesy benches throughout the City. Four of the five City Council members, including Mayor Houston, voted for passage of the ordinance; the remaining voted "present."

Plaintiff contends that Mayor Houston controlled the bidding process; that he recommended to the City Council that the Council approve the

award to Ace Sign Co.; that he voted to approve the contract and that he actually executed the contract. Defendant answers these assertions by stating that no statute or ordinance generally empowers the city's mayor to unilaterally enter into contracts. Moreover, only the city council is vested with the authority to regulate the use of streets and sidewalks, and that power has not been delegated to the mayor by the Council. Ill. Rev. Stat. ch. 24 §1-1-2 (1981); Ill. Rev. Stat. ch. 24 §11-80-2 (1981); Ill. Rev. Stat. ch. 24 §11-80-13 (1981). Furthermore, Defendant points out that four members of the City Council voted affirmatively to award the contract to Ace. Three affirmative votes were required to adopt the ordinance awarding the contract. Ill. Rev. Stat. ch. 24 §4-5-12 (1981). Therefore, Defendant contends, it was legally impossible for him to have awarded the contract. Finally, it is contended that the Defendant is entitled to absolute immunity because he was acting in a legislative capacity when the City Council passed the

ordinance authorizing the contract.

In response to Defendant's absolute immunity argument, Plaintiff states that local legislators are not entitled to absolute immunity and, furthermore, that this action was administrative, not legislative, in nature.

Plaintiff contends that this Court is bound by a decision of the United States Court of Appeals for the Seventh Circuit, Progress Development Corp. v. Mitchell, 286 F.2d 222 (7th Cir. 1961). Briefly, in that case the Deerfield Park Board voted to designate certain areas as park sites and ordered that they be acquired by condemnation proceedings. The purpose behind the condemnation was to prevent the development of the area as residential property, some of which was to be sold to black families. The district court had dismissed the damages count of the complaint against the members of the Park Board on the basis that their action was taken in their legislative capacity and they were thus immune from liability. The Seventh Circuit reversed, stating that "[t]he common law

immunity of state legislators for their acts, recognized in Tenney v. Brandhove, 341 U.S. 367, 378-94 (1951), does not extend to local officials charged with administering in a discriminatory manner the laws so as to preclude Negroes from moving into an all-white community." Id. at 231 (citations ommitted; emphasis original).

However, since Progress Development was decided in 1961, the law regarding local legislative immunity has continued to evolve. In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979), the United States Supreme Court held that federal, state and regional legislators are entitled to absolute immunity when acting in a legislative capacity. Id. at 405. Although the Court specifically did not decide whether purely local legislators are entitled to the same immunity accorded to their federal, state and regional brethren, id. at 404 n. 26, the various courts of appeal, since Lake Country Estates, have extended absolute immunity to local officials when acting in a legislative capacity. See,

Hernandez v. City of LaFayette, 643 F.2d 1188 (5th Cir. 1981), cert. denied, 102 S.Ct. 1251; Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); Rheuark v. Shaw, 628 F.2d 297, 304 n.12 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607, 611-14 (8th Cir. 1980); and Universal Amusement Co., Inc. v. Hofsheinz, 616 F.2d 202, 205 (5th Cir. 1980). Additionally, several district courts have extended absolute immunity to local officials when acting in a legislative capacity. See Goldberg v. Village of Spring Valley, 538 F. Supp. 646, 647-50 (S.D.N.Y. 1982); Burris v. Willis Independent School Dist., 537 F. Supp. 801, 803 (S.D. Tex. 1982); Tolfert v. Nelson County, 527 F. Supp. 836, 839 W.D. Va. 1981).

In Gorman Towers, Inc., supra, the court saw no material distinction between the need for insulated legislative decision making at the state or regional level and a corresponding need at the municipal level. "Indeed, the nature of municipal government may make the need to quell a legislator's

fear of personal retribution particularly compelling." 626 F.2d at 612. Moreover, as the United States Court of Appeals for the Fifth Circuit noted in Hernandez. v. City of LaFayette, 643 F.2d 1188, 1193 (5th Cir. 1981), five Justices of the Supreme Court believe that local legislators are entitled to absolute immunity from § 1983 liability when acting in a legislative capacity. See Owen v. City of Independence, 445 U.S. 622, 664n.6 (1980) (Powell, J. dissenting, joined by Burger, C.J., Stewart and Rehnquist, J. J.); Lake Country Estates, 440 U.S. at 406-8 (Marshall, J., dissenting). In sum, due to intervening contrary authority from the Supreme Court, see Hernandez, 643 F.2d at 1193, it would appear that Progress Development is no longer controlling authority. Although the clear trend of the decisions is to accord absolute immunity to local officials, such immunity exists only for legislative acts. Members of a governing body may not cloak purely administrative action with a legislative shield merely by performing administrative tasks through the passage of

ordinances. However, this Court need not reach the issue of immunity,[1] nor the issue of whether this action was legislative in nature, in light of its disposition of the case on other grounds.

Defendant also claims that he is entitled to dismissal of the case on the basis that Plaintiff's First Amendment rights as enunciated in Elrod v. Burns, 427 U.S. 347 (1976), and Branti v. Finkel, 445 U.S. 507 (1980), have not been violated. In determining whether Plaintiff fails to state a claim for relief, this Court must accept as true the allegations of the complaint. Accordingly, for purposes of the discussion which follows, the Court assumes that Plaintiff's bid was more favorable to the City than that of Ace Sign Company. Furthermore, the Court assumes arguendo that the

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[1] Even if Defendant Houston were found to have been acting in a legislative capacity and to have been entitled to absolute immunity for those actions, the City would not be able to avail itself of such immunity. See Owens v. City of Independence, 445 U.S. 622 (1980).

only reason Plaintiff did not obtain the contract was because Ace supported Houston politically, which Plaintiff did not. Plaintiff contends that the failure to award him the contract on this basis violates his right to freedom of association as guaranteed by the First Amendment. The Court emphasizes that there has not yet been proof adduced that Plaintiff's bid was more favorable, or that the contract was awarded to Ace because of its political support of the Mayor. For purposes of a motion to dismiss, this Court must accept Plaintiff's allegations as fact.

An examination of this issue must start with the seminal case of Elrod v. Burns, 427 U.S. 347 (1976). In that case, a plurality of the United States Supreme Court held that the policy of dismissing public employees solely because of their political affiliation or lack thereof, violated the First Amendment. The plurality noted that the only issue before the Court was the dismissal of public employees for partisan reasons. Id. at 353. The concurring Justices, Stewart and

Blackmun, expressly limited the Court's holding to patronage dismissals and "the narrow position of the concurrence must be taken as the holding of the Court." See Marks v. United States, 430 U.S. 188, 193 (1977); DeLong v. United States, 621 F.2d 618, 622 n.3 (4th Cir. 1980); Orenstein v. Bond, 528 F. Supp. 513 (E.D. Mo. 1981). The concurrency specifically noted that

> [t]his case does not require us to consider the broad contours of the so-called patronage system, with all its variations and permutations. In particular, it does not require us to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular political party, and I would intimate no views whatever on that question.
>
> The single substantive question involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot.

Id. at 374-75.

The Court in Branti v. Finkel, 445 U.S. 507 (1980), modified the Elrod holding in noting that the ultimate inquiry is not whether the label "policymaker" or "confidential" applies to a particular situation. Rather, the question is whether it can be demonstrated that party affiliation is an appropriate requirement for effective performance of the public office involved. However, the Branti court also specifically recognized that it was dealing only with the dismissal of public employees for partisan reasons. Id. at 513 n.7.

The United States Court of Appeals for the Eighth Circuit has held that Elrod and Branti should not be extended beyond dismissals of public employees for partisan reasons. In Fox & Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982), the plaintiff, an accounting firm appointed by St. Louis Mayor Conway to audit the books and records of the St. Louis Board of Education for the fiscal year ended June 30, 1981, was dismissed and replaced by Peat, Marwick, Mitchell & Co. following the election of Vincent Schoemehl as mayor. The court

assumed, for purposes of the motion to dismiss, that plaintiff had been dismissed as city auditor solely because it had not supported Mayor Schoemehl's election bid, whereas Peat, Marwick, Mitchell & Co. had made financial contributions to his campaign. In affirming the district court's dismissal of the complaint, the court held that since plaintiff was an independent contractor and not a public employee, the protection afforded by Elrod and Branti to public employees did not extend to plaintiff.

The Eighth Circuit had previously refused to extend the patronage decisions to cases which did not involve public employees. Sweeney v. Bond, 669 F.2d 542, 545 (8th Cir. 1982). See also Orenstein v. Bond, 528 F. Supp. 513 (E.D. Mo. 1981). Other courts have taken a restrictive approach in their application of the principles enunciated in Elrod and Branti. See DeLong v. United States, 621 F.2d 618, 623-24 (4th Cir. 1980). ("We believe that when the principal [of Elrod and Branti] is applied to patronage practices other than dismissal

it is rightly confined to those that can be determined to be the substantial equivalent of dismissal."); Mazus v. Department of Transportation, 629 F.2d 870, 873 (3d Cir. 1980), cert. denied, 449 U.S. 1126 (1981) (indicating disapproval of dicta in a previous case to the effect that hiring of an employee could not be conditioned in a way which infringes right of political association).

The facts in the case at bar are even more remote from the limited holding in Elrod and Branti than those in Fox. In Fox, the independent contractor-auditor was dismissed from its position. Here, Plaintiff merely was a prospective independent contractor with only a unilateral expectation of being awarded the contract. See Coyne-Delany Co., Inc. v. Capital Development Board, 616 F.2d 341 (7th Cir. 1980); Polyvend, Inc. v. Puckorius, 77 Ill. 2d 287 (1979). Elrod and Branti do not extend so far.

In sum, the decision to award the contract to Ace Sign Co., even assuming that the contract was awarded because of Ace's political support of

the Mayor, did not violate Plaintiff's First Amendment right to freedom of association as delineated by the United States Supreme Court in Elrod and Branti. Because Plaintiff's equal protection claim is tied to his First Amendment-fundamental right claim, that claim also must fail.

To conclude, Plaintiff's motions to amend the complaint and to file a memorandum in opposition to the motion to dismiss are allowed. For the reasons stated above, however, the complaint in its entirety is dismissed for failure to state a claim upon which relief can be granted.

Enter this 3 day of December, 1982.

S/ J. Waldo Ackerman
J. Waldo Ackerman
Chief U.S. District Judge

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

NO. 82-3035

PAUL A. LAFALCE,

Plaintiff-Appellant,

v.

MICHAEL HOUSTON and
CITY OF SPRINGFIELD, ILLINOIS

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Springfield Division. No. 82 C 3203 -- J. Waldo Ackerman, Judge.

ARGUED MAY 11, 1983 -- DECIDED JULY 14, 1983

Before CUDAHY and POSNER, Circuit Judges, and ROSENN, Senior Circuit Judge.*

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* Hon. Max Rosenn of the Third Circuit, sitting by designation.

POSNER, Circuit Judge. We are asked to hold that the First Amendment, as applied to the states through the due process clause of the Fourteenth Amendment, forbids a city to use political criteria in awarding public contracts. The complaint, which was brought under 42 U.S.C. § 1983 and dismissed below on the defendants' Rule 12(b)(6) motion, alleges that the plaintiff submitted a bid to the City of Springfield, Illinois, on behalf of his business, Signs for Progress, to install and maintain benches along city streets; that "of all bids submitted Plaintiff's bid was the most favorable to the City"; but that nevertheless the defendant Mayor caused the city to "award the contract to another bidder, Ace Sign Company, because the operators of Ace Sign Company were political supporters of Defendant [Mayor] while Plaintiff was not." The complaint asks for actual and punitive damages amounting to $750,000.

In Elrod v. Burns, 427 U.S. 347 (1976), and

Branti v. Finkel, 445 U.S. 507 (1980), the Supreme Court held that the discharge of a nonpolicymaking public employee solely because of his political beliefs violates the First Amendment. The basis of these holdings is that public employees would be discouraged from expressing their true political views if it might cost them their jobs. Retribution short of discharge is actionable on the same principle. Delong v. United States, 621 F.2d 618, 623-24 (4th Cir. 1980); Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982). The plaintiff in this case argues that contractors will similarly be discouraged from expressing their true political beliefs if the result of doing so may be the loss of public contracts; they will have an incentive, regardless of their beliefs, to support, financially and in other ways, incumbents or likely winners. The argument has an appealing symmetry but has been rejected in the only two reported cases, both from the Eighth Circuit, to consider it. Sweeney v. Bond, 669 F.2d 542, 545 (8th Cir. 1982); Fox & Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982).

The practice of favoring political supporters in awarding contracts for public projects has a long history at the federal and particularly state and local levels. See, e.g., Caro, The Power Brokers: Robert Moses and the Fall of New York 713-14, 723-24, 738-39, 799 (1974); Heard, The Costs of Democracy 144 (1960). That it could interfere with the free expression of political views whether directly or through its effect on campaign contributions, cf. Buckley v. Valeo, 424 U.S. 1, 14-23 (1976) (per curiam), is hardly open to question. But before we can decide whether the practice is therefore unconstitutional, we must consider both the extent of the likely interference and the consequences of trying to prevent it through an interpretation of the Constitution.

Although some business firms sell just to government, most government contractors also have private customers. If the contractor does

not get the particular government contract on which he bids, because he is on the outs with the incumbent and the state does not have laws requiring the award of the contract to the low bidder (or the laws are not enforced), it is not the end of the world for him; there are other government entities to bid to, and private ones as well. It is not like losing your job. Of course, the contrast can be overstated; unless the government worker who loses his job cannot find another job anywhere, the loss will not be a total catastrophe. Nevertheless, many government workers could not find employment at the same wage in the private sector; and the prospect that a protracted period of search following discharge might well result in a substantially less well paid job would cause many government workers to flinch from taking political stands adverse to their superiors. An independent contractor would tend we imagine to feel a somewhat lesser

sense of dependency.

There is also a question how politically independent most business firms would be even apart from such pressures as the award of public contracts on political grounds may exert on them. Many firms that have extensive government business are political hermaphrodites. They support both major parties (see, e.g., Heard, supra, at 145), and not only or mainly because some government contracts are let on a partisan basis; the pervasive role of government in modern American life has made it important for business firms to be on good terms with the major political groupings in the society. It seems unlikely that the cautious neutrality that characterizes the political activities of American business would be altered even by an ironclad constitutional rule against allowing politics to influence the contracting process.

And against the uncertain benefits of such a rule in promoting the values of the First

Amendment must be set the unknown but potentially large costs. To attempt to purge government of politics to the extent implied by an effort to banish partisan influences from public contracting will strike some as idealistic, others as quixotic, still others as undemocratic, but all as formidable. Patronage in one form or another has long been a vital force in American politics. Civil service laws, laws -- which though not invoked by the plaintiff may be applicable here, see Ill. Rev. Stat. 1981, ch. 24 para. 8-9-1, 8-10-3, 8-10-10, 9-2-100, 9-3-24 -- requiring public contracts to be awarded to the low bidder, laws regulating the financing of political campaigns, and decisions such as Elrod and Branti have reduced the role of patronage in politics but have not eliminated it entirely. The desirability of reducing it still further raises profound questions of political science that exceed judicial competence to answer; for a skeptical view of its desirability see, e.g., Johnston,

Political Corruption and Public Policy in America 61 (1982). The consequences might be wholly desirable, or wholly undesirable, or some mixture of the two, but we are reluctant to tamper with political institutions when the competing First Amendment interests are as attenuated as they appear to be here.

A practical consideration reinforcing our caution is that a decision upholding a First Amendment right to have one's bid considered without regard to political considerations would invite every disappointed bidder for a public contract to bring a federal suit against the government purchaser. Civil service laws protect many public employees from being discharged; but it is in the nature of competitive bidding that every award of a contract involves the rejection of one or more other bids, each of which could form the basis of a federal suit under the theory advanced by the plaintiff in this case.

We are particularly reluctant to take so big a step in the face of the Supreme Court's apparent desire to contain the principle of Elrod and Branti. As the Eighth Circuit pointed out in Sweeney v. Bond, supra, 669 F.2d at 542, 545, the plurality opinion in Elrod, after noting that "the general practice of political patronage" includes making "nonofficeholders . . . the beneficiaries of lucrative government contracts for highway construction, buildings, and supplies," states: "Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons." 427 U.S. at 353.

Some day the Supreme Court may extend the principle of its public-employee cases to contractors. But there are enough differences in the strength of the competing interests in the two classes of case to persuade us not to attempt to do so. AFFIRMED.

C-1

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 9, 1983

Before

Hon. Richard D. Cudahy, Circuit Judge

Hon. Richard A. Posner, Circuit Judge

Hon. Max Rosenn, Senior Circuit Judge*

PAUL A. LA FALCE, Plaintiff-Appellant, No. 82-3035 vs. MICHAEL HOUSTON and CITY OF SPRINGFIELD, ILLINOIS, Defendants-Appellees.	Appeal from the United States District Court for the Central District of Illinois, Springfield, Division. No. 82 C 3203 J. Waldo Ackerman, Judge.

ORDER

On July 28, 1983, plaintiff-appellant Paul A. LaFalce filed a petition for rehearing with suggestion of rehearing en banc. All of the judges of the original panel have voted to deny

*Hon. Max Rosenn of the Third Circuit, sitting by designation.

the petition, and none of the active members of the court has requested a vote on the suggestion for rehearing en banc.** The petition is therefore DENIED.

** Hon. Harlington Wood, Jr. did not participate in the consideration or decision of this petition for rehearing en banc.

NO. 83-762

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

PAUL A. LaFALCE,

Petitioner,

vs.

MICHAEL HOUSTON and
CITY OF SPRINGFIELD, ILLINOIS,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SEVENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Attorney for Respondents

IN THE

SUPREME COURT OF THE UNITED STATES

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PAUL A. LaFALCE,

Petitioner,

vs.

MICHAEL HOUSTON and
CITY OF SPRINGFIELD, ILLINOIS,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. Whether or not an independent contractor, with only a unilateral expectation of receiving a municipal contract, suffers a violation of his First Amendment rights if the City Council votes to award the contract to a contractor who

was a political supporter of the Mayor of the City of Springfield, Illinois.

2. Whether or not Michael Houston is absolutely immune from suit.

3. Whether or not Michael Houston actually awarded the contract to Ace Sign Co.

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STATUTES INVOLVED

Section 4-5-11 of the Illinois Municipal Code (Ill.Rev.Stat. 1981, ch. 24, par. 4-5-11) provides:

> Except as otherwise provided, all contracts, of whatever character, pertaining to public improvement, or to the maintenance of the public property of a municipality involving an outlay of $1,500 or more, shall be based upon specifications to be approved by the council. Any work or other public improvement which is not to be paid for in whole or in part by special assessment or special taxation, when the expense thereof will exceed $2,500, shall be constructed as follows:
>
> (1) By a contract let to the lowest bidder after advertising for bids, in the manner prescribed by ordinance, except that any such contract may be entered into by the proper officers without advertising for bids, if authorized by a vote of 4 of the 5 council members elected; or
>
> (2) In the following manner, if authorized by a vote of 4 of the 5 council members elected: the commissioner of public works or

> other proper officers to be designated by ordinance, shall superintend and cause to be carried out the construction of the work or other public improvement and shall employ exclusively for the performance of all manual labor thereon, laborers and artisans whom the city or village shall pay by the day or hour, but all material of the value of $1,500 and upward used in the construction of the work or other public improvement, shall be purchased by contract let to the lowest responsible bidder in the manner to be prescribed by ordinance.
>
> Nothing contained in this section shall apply to any contract by a municipality with the United Stated of America or any agency thereof.

Section 4-5-12 of the Illinois Municipal Code (Ill.Rev.Stat. 1981, ch. 24, par. 4-5-12) provides:

> Regular meetings of the council shall be held on the first Monday after the mayor and commissioners have entered upon the performance of their official duties, and at least twice each month thereafter. The council shall provide by ordinance for the holding of regular meetings. Special meetings may be

called from time to time by the mayor or by 2 commissioners upon giving notice of not less than 24 hours to all members of the council. Public notice of meetings must also be given as prescribed in Sections 2.02 and 2.03 of "An Act in relation to meetings", approved July 11, 1957, as heretofore or hereafter amended. All meetings of the council, whether regular or special, shall be open to the public.

The mayor and each commissioner shall have the right to vote on all questions coming before the council. Three members of the council shall constitute a quorum, and the affirmative vote of 3 members shall be necessary to adopt any motion, resolution, or ordinance, unless a greater number is provided for by this article.

Upon every vote the "yeas" and "nays" shall be called and recorded. Every motion, resolution, or ordinance shall be reduced to writing and read before a vote is taken thereon. The style of all ordinances shall be: "Be it ordained by the council of the city (or village) of _____."

The mayor shall have no power to veto, but every resolution, ordinance or warrant passed or ordered

> by the council must be signed by the mayor, or by 2 commissioners, and all ordinances and resolutions shall be filed for record, before they shall be in force.

Section 11-80-2 of the Illinois Municipal Code (Ill.Rev.Stat. 1981, ch. 24, par. 11-80-2) provides:

> The corporate authorities of each municipality may regulate the use of the streets and other municipal property.

Section 11-80-13 of the Illinois Municipal Code (Ill.Rev.Stat. 1981, ch. 24, par. 11-80-13) provides:

> The corporate authorities of each municipality may regulate the use of sidewalks, the construction, repair, and use of openings in sidewalks, and all vaults and structures thereon and thereunder, including telephone booths, and may require the owner or occupant of any premises to keep the sidewalks abutting the premises free from snow and other obstructions.

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the District Court (Petitioner's Appendix A, at A1-3).

SUMMARY OF THE ARGUMENT

The decision of the Seventh Circuit Court of Appeals does not conflict with decisions of the U.S. Supreme Court. The decisions of the U.S. Supreme Court in Perry v. Sinderman, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972); Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976); Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) involved suits by public employees who were being subjected to dismissal or the threat of dismissal because of the exercise of their First Amendment rights of freedom of speech or freedom of association. In this case, Petitioner,

Paul LaFalce, is not a public employee being threatened with dismissal because of his political beliefs or partisan affiliation. Petitioner is an independent contractor who claims he did not receive a contract because of political favoritism. As the plurality opinion in Elrod states:

> Although political patronage comprises a broad range of activities, we are here concerned only with the constitutionality of dismissing public employees for partisan reasons. 427 U.S. at 353.

The present decision of the Seventh Circuit Court of Appeals is fully in accord with the only other decisions by a Court of Appeals in which the same issue has been presented. Fox & Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982); Sweeney v. Bond, 669 F.2d 542 (8th Cir. 1982) Cert. denied. 103 S.Ct. 174 (1982).

The Petition does not present an

important question of federal law. Most governmental contracts involving the expenditure of public funds must be let to the lowest responsible bidder. (See, Ill. Rev.Stat. 1981, ch. 24, par. 4-5-11.) These statutes will neutralize the impact of political favoritism in awarding City contracts. Also, an independent contractor can always seek business from the private sector as well as the public sector. The loss of a City contract is not the end of the world for an independent contractor. Many contractors contribute to both parties or candidates, thus, eliminating the need for a constitutional rule protecting their freedom of speech and association. The realities of business would still lead to contributions by government contractors to both major parties. Thus, to extend the First Amendment so as to protect independent contractors would be only a symbolic

gesture.

Independent contractors simply do not need the protection that a public employee needs. If a public employee is fired for exercising his First Amendment rights, the results could be very serious in that his sole source of livelihood could be in jeopardy. Thus, it is a real possibility that a public employee could be coerced into supporting a political party that he does not wish to support for fear of losing his job. The possibility of such coercion being successfully applied to independent contractors is much more remote.

Also, it should be pointed out that Petitioner's complaint was in two counts. The first count was against Mayor Michael Houston. Houston, however, is absolutely immune from suit. Also, Houston lacked the power to let the bus courtesy bench contract. The contract was in fact let

by the City Council by a vote of 4 to 0. (Petitioner's Appendix, at A-1.)

ARGUMENT

I

THE DECISION OF THE SEVENTH CIRCUIT COURT OF APPEALS DOES NOT CONFLICT WITH DECISIONS OF THE U. S. SUPREME COURT

In his Complaint, Petitioner alleges he did not receive the contract because the operators of Ace Sign Co. had made contributions to Mayor Michael Houston's campaign, while Petitioner made no such contributions.

The two Supreme Court cases dealing with political patronage, i.e. Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547, (1976) and Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980), have only dealt with partonage dismissals of public employees. They are not applicable to the dismissal of inde-

pendent contractors, let alone to prospective independent contractors who fail to win the contract.

In Elrod v. Burns, supra, non-civil service employees of the Cook County Sheriff's Office who were Republicans filed suit to prevent the newly-elected Democratic sheriff from firing them solely because they refused to associate with the Democratic party. In Elrod, a plurality of the Court held that dismissing public employees solely for partisan reasons violated the First Amendment. The plurality opinion, by Justice Brennan, restricted the holding of the Court to the dismissal of public employees for partisan reasons. (Elrod v. Burns, 427 U.S. at 353, 96 S.Ct. at 2679.)

The concurring opinion of Justices Stewart and Blackman was narrowly limited to the dismissal of a government em-

ployee solely because of his political beliefs. The position of the concurring opinion is considered the opinion of the Court. (Marks v. United States, 430 U.S. 188, 193 (1977); DeLong v. United States, 621 F.2d 618, 622 n.3 (4th Cir. 1980); Orenstein v. Bond, 528 F.Supp. 513 (E.D. Mo. 1981).)

In their concurring opinion, Mr. Justices Stewart and Blackman stated:

> "Although I cannot join the plurality's wide-ranging opinion, I can and do concur in its judgment.
>
> This case does not require us to consider the broad contours of the so-called patronage system, with all its variations and permutations. In particular, it does not require us to consider the constitutional validity of a system that confines the hiring of some governmental employees to those of a particular party, and I would intimate no views whatever on that question.
>
> The single substantive question

> involved in this case is whether a nonpolicymaking, nonconfidential government employee can be discharged or threatened with discharge from a job that he is satisfactorily performing upon the sole ground of his political beliefs. I agree with the plurality that he cannot. See, Perry v. Sindermann, 408 U.S. 593, 597-598, 92 S.Ct. 2694, 2697-2698, 33 L.Ed.2d 570." (Emphasis added) (Elrod v. Burns, 96 S.Ct. at 2690.)

The Court in Branti v. Finkel, supra, did away with the concepts of "policymaker" or "confidential" in determining if a person can be dismissed for partisan reasons. The question is whether party affiliation is an appropriate requirement for effective performance of the public office involved. Most importantly, the Branti court specifically noted that its opinion was limited to the dismissal of public employees for partisan reasons. (Branti v. Finkel, 445 U.S. 507, 513 n.7, 100 S.Ct. 1287, 63 L.Ed. 2d 574 (1980).)

In Sweeney v. Bond, 669 F.2d 542

(8th Cir. 1982), Cert. denied 103 S.Ct. 174 (1982), plaintiffs were Democrats and were appointed fee agents for the Missouri Department of Revenue by Governor Teasdale, a Democrat. Republican Governor Bond dismissed them from their positions. Plaintiffs sued, claiming their dismissal was based upon political affiliation and, as such, a violation of the First Amendment.

The Eighth Circuit Court of Appeals noted that Elrod and Branti were limited to the dismissal of public employees for partisan reasons. It then examined the duties of fee agents and determined they were more in the nature of independent contractors and not employees.

The Sweeney court refused to extend First Amendment protection to patronage practices that do not involve the dismissal of public employees. The Court

of Appeals pointed out that Elrod and Branti are limited only to the dismissal of government employees for partisan reasons. As such, the Court of Appeals affirmed the lower court's dismissal of the complaint.

In Fox & Co. v. Schoemehl, 671 F.2d 303 (8th Cir. 1982), a public accounting firm brought suit against the Mayor of St. Louis pursuant to 42 U.S.C. 1983. Plaintiffs were accountants appointed by Mayor Conway to audit the St. Louis Board of Education. Following the election of Mayor Schoemehl, plaintiffs were dismissed and replaced by Peat, Marwick, Mitchell & Co., another accounting firm that had made contributions to Schoemehl's campaign. Plaintiffs complained of dismissal for political reasons in violation of the First Amendment. Plaintiffs did not dispute the fact that they were in-

dependent contractors. As such, the Court of Appeals held they do not enjoy the protection of Elrod or Branti because plaintiffs were not public employees. The Court of Appeals affirmed the District Court's dismissal of plaintiff's complaint.

The decision of the Seventh Circuit Court of Appeals in no way conflicts with this Court's decision in Perry v. Sinderman, Elrod v. Burns and Branti v. Finkel. Those cases involved the protection of public employees from termination solely because they exercised their First Amendment rights. This case, however, does not involve a public employee threatened with discharge but only involves a contractor who is seeking a contract with the City of Springfield. Therefore, the Petition for Writ of Certiorari should be denied.

II

THE SEVENTH CIRCUIT COURT OF APPEALS FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

The petitioner, Paul LaFalce, sought a contract to install and maintain bus courtesy benches along (Petitioner's Appendix, A-1) City right-of-way. LaFalce would pay the City for the use of the right-of-way and would sell advertising on the back of the benches. The City of Springfield was not purchasing goods from LaFalce. In contracts involving an expenditure of City funds of $2500 or more, the City awards the contract to the lowest responsible bidder. (See, Ill.Rev. Stat. 1981, ch. 24, par. 4-5-11.) Thus, many prospective City contractors would be protected by the provisions of Section 4-5-11 of the Illinois Municipal Code. As such, the necessity of making political contributions to do business

with the City is severely undercut by Section 4-5-11.

Obviously, an independent contractor can do business with the private sector as well as the public sector. Thus, if Petitioner does not get a contract with the City, it is not the end of the world. Petitioner can bid on jobs in the private sector as well as other government contracts.

The Seventh Circuit Court of Appeals also questioned the benefit that would be gained if the contract award process is purged of political influence. The cautious neutrality that characterizes the political activities of American business would probably not be altered even by an ironclad rule against political favoritism in awarding contracts. (Petitioner's Appendix, B-6.)

Most importantly, to afford constitutional protection to every disappointed bidder on a government contract would open the door to a flood of lawsuits.

The question raised by Petitioner as to the need for protecting prospective contractors from political favoritism is simply not so important as to warrant review by the U. S. Supreme Court. Many contracts will be regulated by statutes requiring the contract to be let to the lowest responsible bidder regardless of whether the contractor made any political contributions to any member of the City Council. Therefore, the Petition for Writ of Certiorari should be denied.

III

MAYOR HOUSTON IS ABSOLUTELY IMMUNE FROM SUIT

A

MUNICIPAL LEGISLATORS ARE ENTITLED TO ABSOLUTE IMMUNITY

Ace Sign Company was awarded the contract pursuant to legislative action. The City Council on July 8, 1980 passed an ordinance approving the terms of the contract and authorizing the Mayor to execute the contract on behalf of the City. The vote was 4 to 0 with the Mayor voting in the affirmative.

Houston is absolutely immune from suit because he was acting in a legislative capacity when the ordinance authorizing the contract was passed. Several Federal courts have recognized that local legislators are absolutely immune from suit for action taken within their legislative capacity.

Absolute immunity for local legislators has its roots in Tenney v. Brandhove,

341 U.S. 367, 71 S.Ct. 783, 95 L.Ed. 1019 (1951). In Tenney the Supreme Court recognized absolute immunity for state legislators from suits brought pursuant to 42 USC 1983 as long as the legislators were acting within the sphere of legitimate legislative activity, stating:

> "The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggle of the Sixteenth and Seventeenth Centuries." (71 S.Ct. at 783,786.)

What remedy does one have when he contends a legislator acting within a legislative capacity abused his powers? Frankfurter replied: "Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses." (71 S.Ct. at 789.)

In Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979),

California and Nevada entered into a compact to create the Tahoe Regional Planning Agency (TRPA) to regulate development of the Lake Tahoe Basin resort area and to conserve its national resources. Six of the ten TRPA members were appointed by county and city governments in California and Nevada and two were members by virtue of their offices in state natural resource agencies.

TRPA adopted a land use ordinance that affected the value of plaintiff's land. Plaintiff brought suit against TRPA and its individual members pursuant to 42 USC 1983, claiming violation of the Fifth and Fourteenth Amendments.

The Court held that TRPA could not have Eleventh Amendment immunity from a 1983 action because it was not functioning as a state but as a political subdivision of the states involved.

(99 S.Ct. at 1177-1178.)

More importantly, the Court held that the individual members of TRPA were absolutely immune from Section 1983 suits for actions that took place in their legislative capacity. Thus, the Court widened the scope of absolute immunity for legislators to include members of a regional political subdivision. (99 S.Ct. at 1179.)

The policy that the Court relied on was that pointed out by Mr. Justice Frankfurter in Tenney v. Brandhove, 71 S.Ct. 783 at 788. (The "public good" rationale.) In order to enable a legislator to perform his duties effectively he must enjoy unfettered freedom of speech and action. Frankfurter pointed out in Tenney that if a legislator is subjected to the cost and inconvenience of trial or the hazard of a judgment it

will impede legislators in the uninhibited discharge of their legislative duty. (71 S.Ct. at 788.)

Mr. Justice Marshall, in his dissent, notes that the Court's decision leaves little room to argue that municipal legislators stand on a different level than their regional government counterparts. The same policy of protecting legislators from the costs of trial and judgments so as to protect their free exercise of legislative powers applies equally to municipal legislators as it does to TRPA legislators. (99 S.Ct. at 1180.)

In Lake Country Estates, the members of TRPA were appointed. However, the members of the Springfield City Council are elected. Thus, they are subject to the discipline of the voters if they abuse their legislative power. (Tenney v. Brandhove, 71 S.Ct. at 788.)

Since the Lake Country Estates, Inc. decision in 1979, several Courts of Appeals and District Courts have recognized absolute immunity for local legislators from Section 1983 suits. (Reed v. Village of Shorewood, 704 F.2d 943 (7th Cir. 1983); Aitchison v. Raffiani, 708 F.2d 96 (3rd Cir. 1983); Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982); Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980); Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981), Cert. denied, 102 S.Ct. 1251 (1982); Tolbert v. County of Nelson, 527 F.Supp. 836 (W.D.Va. 1981); Goldberg v. Village of Spring Valley, 538 F.Supp. 646 (S.D.N.Y. 1982).)

Most recently, the Ninth Circuit Court of Appeals recognized that local legislators have complete immunity from suits

based on their legislative acts. (Kuzinich v. County of Santa Clara, 689 F.2d 1345 (9th Cir. 1982).) In Kuzinich, the Board of Supervisors of the County of Santa Clara adopted an amendment to the zoning ordinances which made the operation of Kuzinich's adult theater and bookstore unlawful in the locations at which they were operating. Kuzinich brought suit against the county, its board of supervisors and certain individuals claimint violations of his constitutional rights. The Court of Appeals recognized that the board of supervisors as a legislative body were immune from suit. At page 1350 the Court states:

> "We hold that members of local legislative bodies have complete immunity from suits based on their legislative acts and also that the enactment of a general zoning ordinance is a legislative act. Though the question has been left open until now in this circuit (see Morrison v. Jones,

607 F.2d 1269, 1274 (9th Cir. 1979)), in so holding we follow what we believe to be the rule announced in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99 S.Ct. 1171, 59 L.Ed.2d 401 (1979), and the positive declarations by the Fifth, Fourth, and Eighth Circuits in the cases of Hernandez v. City of Lafayette, 643 F.2d 1188 (5th Cir. 1981); Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); and Gorman Towers, Inc. v. Bogoslavsky, 626 F.2d 607 (8th Cir. 1980). We add only this to the decisions in those cases: the manifest need for a rule of absolute immunity is illustrated in this case. Here legislators are involved in balancing social needs against constitutional rights, the kind of balancing which often produces plurality opinions, and almost always dissenting opinions, in the Supreme Court. These legislators now find themselves sued for the total of $2,500,000.00 general damages and $5,000,000.00 punitive damages by a plaintiff whose business, as nearly as we can determine from the record, has not been shut down one day."

The decision of the Supreme Court in Lake Country Estates, Inc. v. Tahoe Regional Planning Agency, 440 U.S. 391, 99

S.Ct. 1171, 59 L.Ed.2d 401 (1979), and the decisions of the Courts of Appeals in the Third, Fourth, Fifth, Seventh, Eighth and Ninth Circuits leave little doubt that today the law is that City legislators are absolutely immune from Section 1983 suits based on decisions made in a legislative capacity.

B

HOUSTON WAS ACTING IN A LEGISLATIVE CAPACITY

There is little doubt that local legislators may claim absolute immunity from Section 1983 suits, but they must have been acting in a legislative capacity to be entitled to claim such immunity.

In Tenney v. Brandhove, supra, state legislators were working on a legislative committee. Legislative committees are often used to gather information in

order to determine if legislation should be presented to the legislature.

In this case Petitioner (d/b/a Signs of Progress) submitted his bid for the installment and maintenance of bus courtesy benches throughout Springfield. Petitioner was in effect seeking a franchise from the City whereby he would be able to use City property to place his bus courtesy benches. He would then sell advertising to be placed on these benches.

The City Council finally awarded the franchise to another bidder, Ace Sign Company. The franchise was awarded by ordinance. All of the guidelines of the franchise are contained in the contract which was attached to the ordinance.

In short, the contract contains the guidelines by which the franchise for providing bus courtesy benches must operate. There are no other City

ordinances pertaining to letting such a franchise to place bus courtesy benches on City property.

The power to permit someone to use City property is vested in the corporate authorities of the City by Sections 11-80-2 and 11-80-13 of the Illinois Municipal Code (Ill.Rev.Stat. 1981, ch. 24, pars. 11-80-2 and 11-80-13). This power has not been delegated to the Mayor, and consequently, Houston had no power to grant a franchise to place bus courtesy benches on City property. He had no unilateral power to grant a contract to Ace Sign Company or Plaintiff.

There has been no execution or administration of ordinances or laws. Quite the opposite, the contract was awarded to Ace Sign Company by ordinance and the provisions of the contract contain the only policy guidelines by which Ace

Sign Company is to operate the franchise.

Ordinances enacted by municipal governing boards are legislative acts of legislative bodies. (Artz v. Commercial National Bank of Peoria, 125 Ill.App.2d 86, 259 N.E.2d 813 (1970).)

The contract awarding Ace Sign Company the privilege of placing bus courtesy benches on City right-of-way was approved by ordinance. The contract contains the only guidelines governing the placement and maintenance of the benches. There is little doubt that Mayor Houston was acting in a legislative capacity throughout the preparation, consideration and adoption of this ordinance. The granting of a franchise to use public right-of-way is an exercise of the City's legislative authority. (People ex rel. Better Broadcasting Council, Inc. v. Keane, 17 Ill.App.3d 1090, 309 N.E.2d 362, 367 (1974).) The provisions of a

contract adopted by ordinance also fall within the sphere of legislative activity. (Midwest Television, Inc. v. Champaign-Urbana Communications, Inc., 37 Ill.App.3d 926, 347 N.E.2d 34, 40 (1976).)

It is clear Mayor Houston was at all relevant times acting in a legislative capacity. To hold Houston absolutely immune from suit, does not leave Petitioner without remedies. Houston is an elected official and is subject to the discipline of the voters. (Tenney v. Brandhove, 71 S.Ct. at 788.)

IV

AS A MATTER OF FACT AND LAW, MAYOR HOUSTON DID NOT AWARD THE CONTRACT IN QUESTION

The critical element of Count I of the Complaint is the allegation that the contract in question was awarded by Mayor Houston. As a matter of fact and law, however, Mayor Houston did not, and could

not have awarded the contract in question. Rather, it was the City Council of the City of Springfield which awarded the contract, and, consequently, Count I fails to state a claim upon which relief can be granted.

The contract in question, as a matter of fact, was awarded by the City Council, and not by Houston. While Mayor Houston is the signatory on the contract, he is so only pursuant to direction of the City Council as evidenced by the ordinance. It is clear that the City Council and not Defendant awarded the contract.

Furthermore, as a matter of law, Mayor Houston could not have awarded the contract himself. It is a fundamental principle of municipal law that an officer of a municipal corporation cannot bind it by contract unless he is expressly

authorized to do so, or unless the power to do so is necessarily implied from the powers expressly given by statute or by the corporation acting within its powers and in the manner provided by law. (M.A.T.H., Inc. v. Housing Authority of East St. Louis, 34 Ill.App.3d 884, 341 N.E. 2d 51 (1976).) In M.A.T.H., the plaintiff alleged that it was induced to continue a contract with the defendant Housing Authority by a letter from the authority's chairman promising to renegotiate the contract to a higher price after the work called for was completed. The Court ruled that there was no duty for the Authority to renegotiate the contract on the basis that the statute in question did not grant to the chairman or any other member of the Housing Authority any power to contract.

Similar to M.A.T.H., there is no

statute or ordinance which granted Houston the power to award the contract in question. First, there is no statute or ordinance which generally empowers the City's Mayor to unilaterally enter into contracts. Second, with specific reference to public property, it is the corporate authority of a city, being its city council (Ill.Rev. Stat. 1981, ch. 24, par. 1-1-2), which is vested with the power to regulate the use of streets and other municipal property (Ill.Rev.Stat. 1981, ch. 24, par. 11-80-2) and sidewalks. (Ill.Rev.Stat. 1981, ch. 24, par. 11-80-13.) The City Council had not delegated this power to its Mayor. Third, as indicated by a certified copy of a portion of the minutes of the City Council meeting at which the contract in question was awarded, Houston cast only one of the four affirmative votes. Since three affirmative votes were required to

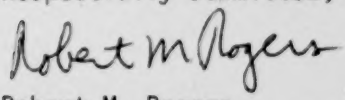
adopt the ordinance awarding the contract (Ill.Rev.Stat. 1981, ch. 24, par. 4-5-12), it was legally impossible for Houston to have awarded the contract.

In summary, given that 1) the relief requested by Count I of the Complaint is premised upon the contract in question having been awarded by Houston, and 2) Houston did not, as a matter of fact, and could not have, as a matter of law, awarded the contract, there exists no claim upon which relief can be granted. Therefore, the Petition for Writ of Certiorari should be denied.

CONCLUSION

For the reasons set forth above, the Petition for Certiorari should be denied.

Respectfully submitted,



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